

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: July 14, 2005

Decided: September 19, 2005)

5 Docket Nos. 04-6477-cr

6 -----
7 UNITED STATES OF AMERICA,

8 Appellee,

9 - v -

10 EDWARD GANDIA,

11 Defendant-Appellant.
12 -----

13 Before: STRAUB and SACK, Circuit Judges, and KRAVITZ, District
14 Judge.*

15 Defendant-appellant Edward Gandia was convicted,
16 following a bench trial in the United States District Court for
17 the Southern District of New York (William H. Pauley, III, Judge)
18 on charges of being a felon in possession of a firearm and
19 ammunition in violation of 18 U.S.C. § 922(g), and sentenced
20 principally to eighty-four months in prison. Before trial, the
21 district court denied the defendant's motion to suppress evidence
22 that police officers discovered as a result of a warrantless
23 search of his home. The district court held that the police
24 officers had entered the apartment with the defendant's consent

* The Honorable Mark R. Kravitz, of the United States District Court for the District of Connecticut, sitting by designation.

1 to interview him and that once inside, they were justified in
2 making a "protective sweep" under Maryland v. Buie, 494 U.S. 325
3 (1990), in the course of which they found the evidence.

4 Remanded.

5 NEIL B. CHECKMAN, New York, NY, for
6 Defendant-Appellant.

7 SARAH Y. LAI, Assistant United States
8 Attorney for the Southern District of
9 New York (David N. Kelley, United States
10 Attorney, Peter G. Neiman, Assistant
11 United States Attorney, of counsel), New
12 York, NY, for Appellee.

13 SACK, Circuit Judge:

14 The defendant-appellant, Edward Gandia, appeals from
15 his conviction and sentence, following a bench trial in the
16 United States District Court for the Southern District of New
17 York (William H. Pauley, III, Judge) on charges of being a felon
18 in possession of a firearm and ammunition in violation of 18
19 U.S.C. § 922(g). Prior to trial, Gandia moved to suppress a
20 firearm and ammunition that police officers had discovered as a
21 result of a warrantless search of the living room and bedroom of
22 his apartment. The government argued that because Gandia
23 consented to the entry of the officers into his kitchen for the
24 purpose of interviewing him, they were entitled to search other
25 rooms of his apartment as part of a "protective sweep."

26 The district court agreed with the government. It
27 denied Gandia's motion to suppress, holding 1) that under
28 Maryland v. Buie, 494 U.S. 325 (1990), once properly inside a
29 person's home, police officers are permitted to conduct

1 protective sweeps even when they have not entered the home with
2 an arrest warrant, and 2) that there was an objective basis for
3 reasonable concern about risk to the officers' safety in Gandia's
4 apartment that justified their limited, protective sweep in the
5 course of which the evidence sought to be suppressed was found.
6 Because we disagree with the district court's second conclusion
7 and decide that this search was not supported by "specific and
8 articulable facts that the area to be swept harbor[ed] an
9 individual posing a danger" to the officers, Buie, 494 U.S. at
10 337, we need not and do not resolve whether, even when
11 accompanied by such specific and articulable facts, Buie permits
12 police officers to conduct a protective sweep of a suspect's home
13 without an arrest warrant. See United States v. Moran Vargas,
14 376 F.3d 112, 115 (2d Cir. 2004) (concluding that, having decided
15 the second issue, we need not address the first). Accordingly,
16 we remand for further proceedings including reconsideration of
17 whether to resentence Gandia under United States v. Crosby, 397
18 F.3d 103, 119 (2d Cir. 2005).

19 BACKGROUND

20 The Search of Gandia's Apartment¹

21 On the evening of November 28, 2003, three New York
22 City Police Department police officers -- Sergeant Morales,
23 Officer Lawton, and Officer Perez -- received a radio report of a

¹ The recitation of facts is based on the testimony of two police officers (Sergeant Morales and Officer Lawton) and the defendant at the suppression hearing. We have indicated where the testimony of the witnesses is inconsistent.

1 dispute between a building superintendent and a tenant at 381
2 East 151st Street in the Bronx. The report indicated that one of
3 the parties might be wielding a gun and described him as a
4 Hispanic male wearing a yellow jacket and gray pants. When the
5 officers arrived at the building in question a minute or two
6 later, they saw Gandia, who matched the description from the
7 radio report. The building superintendent, Pablo Suarez,
8 approached from an alleyway to speak with Sergeant Morales.
9 Suarez told Morales that Gandia had accosted him (Suarez) and
10 accused Suarez of telling the building landlord that Gandia was a
11 "rat." According to Suarez, Gandia began to pull an object,
12 which Suarez thought to be a gun, from his waist area. Suarez
13 ran into his apartment, and Gandia tried to follow, banging on
14 Suarez's front door and, according to Morales's later testimony,
15 saying something to the effect of, "I don't care if you call the
16 cops, I'm still going to get you anyway." Suppression Hr'g Tr.,
17 Apr. 28, 2004, ("Hr'g Tr.") at 7.

18 While Sergeant Morales spoke with Suarez, Officers
19 Lawton and Perez approached Gandia and identified themselves as
20 police officers. The officers frisked Gandia. He was unarmed.
21 Without being asked, Gandia told the officers that he did not
22 have a gun. Gandia explained that he had confronted Suarez
23 because Suarez had been falsely telling residents that Gandia had
24 a gun. Neither of the officers had their weapons drawn during
25 this encounter. The tone of the conversation was calm.

1 After speaking with Suarez, Sergeant Morales told him
2 to go back to his apartment. Morales then joined the other
3 officers talking to Gandia. Suarez soon came back outside,
4 however, and resumed his shouting match with Gandia.

5 Morales then asked Gandia if he lived in the building.
6 Gandia replied that he did and, when asked, gave the officers his
7 apartment number. One of the officers asked Gandia if they could
8 go up to his apartment to discuss what had happened. Sergeant
9 Morales and Officer Lawton later testified that they had done so
10 because it was raining, because they wanted to separate Gandia
11 and Suarez to avoid any further conflict, and because they had
12 insufficient privacy while in front of the building to conduct an
13 interview. Gandia agreed to take them to his apartment. None of
14 the officers had his weapon out, Gandia was not handcuffed or
15 otherwise constrained, and the tone of the conversation remained
16 calm.

17 The three police officers escorted Gandia to his
18 apartment. Before Gandia opened the door, Sergeant Morales asked
19 Gandia if anyone else was there. Gandia replied that he lived
20 alone. He opened the door and entered the apartment first,
21 followed by the police officers. They did not ask him for
22 permission to conduct a search. Morales later testified that he
23 knew Gandia had given them permission to enter the apartment but
24 had not given them permission to search it.

25 Gandia's front door opened directly into a small
26 kitchen. A door to one side of the kitchen led into the

1 bathroom, directly opposite the front door of the apartment.

2 There was also a doorframe, without a door on the hinges, which
3 led from the kitchen into the adjoining living room.

4 Sergeant Morales walked over to this open doorframe and
5 positioned himself just outside the kitchen and inside the living
6 room. The two other officers remained in the kitchen area,
7 talking to Gandia. From where Morales stood, he could see the
8 "whole apartment." Hr'g Tr. at 10. Morales later testified that
9 he did this for "safety reasons" because, despite having been
10 told otherwise by Gandia, he did not know whether there were
11 other people in the apartment. Id. Morales testified that he
12 did not "trust anyone" because "[a]nybody can tell me anything."
13 Id. at 11. Although Morales testified that he did not try to
14 hide his movements while walking over to the living room, Gandia
15 testified that he did not see Morales because he was preoccupied
16 with talking with the two other police officers.

17 The conversation between Gandia and the police officers
18 lasted for about a minute to a minute-and-a-half. The atmosphere
19 remained calm. Gandia was not physically restrained or
20 instructed to remain in the kitchen. He nonetheless remained
21 standing there.

22 During the conversation, Sergeant Morales did not see
23 anyone in the living room or hear any sounds indicating that
24 someone else was present in the apartment. As he was "looking
25 all over the apartment" from his position near the doorframe,
26 however, Morales noticed something that "appear[ed] to [him] to

1 be a bullet," standing upright on top of a home entertainment
2 center, about eighteen to twenty-three feet from where he was
3 standing. Id. at 12-13. Morales took a few steps further into
4 the living room and asked Gandia, who was still in the kitchen,
5 whether the object was, in fact, a bullet. Gandia said that it
6 was a "fake." Id. at 12. Morales later testified that this
7 exchange was calm, but Lawton testified that Gandia was upset
8 when he answered Morales's question.

9 Morales picked up the bullet, saw that it was marked
10 .45 caliber, and told Gandia, "[I]t looks real to me." Id. at
11 14. At that point, Morales took a "quick peek" into the bedroom
12 -- which was connected to the living room, toward the back, by
13 another doorless frame -- as a "safety measure[]," to see if
14 someone else was in there. Id. at 14-15. He saw no one, but did
15 see, hanging on the bedroom wall, a chart containing
16 illustrations of different types of bullets. Morales did not
17 open any furniture drawers, and did not look in any other
18 enclosures or under the furniture, in either in the living room
19 or the bedroom.

20 Officer Lawton gave a somewhat different account of how
21 the bullet was discovered. Lawton testified that after talking
22 with Gandia in the kitchen for about a minute, and after Sergeant
23 Morales had already entered the living room, Lawton also went
24 into the living room to make sure no one was there. He said that
25 he saw Morales standing on the other side of the room, near the
26 wall. Lawton then noticed the bullet standing upright on top of

1 the entertainment center. He testified that after seeing the
2 bullet, he went into the bedroom to make sure no one else was
3 there. He then saw the bullet chart on Gandia's bedroom wall.
4 Lawton did not open any drawers or doors, and did not look under
5 the furniture or in the living room or bedroom. Lawton then
6 returned to the kitchen, where Gandia was still standing with
7 Officer Perez.

8 Lawton testified that he briefly looked behind the sink
9 next to Gandia to make sure that there were no firearms within
10 his reach. Lawton then went back to the living room, picked up
11 the bullet, and showed it to Morales, who asked Gandia about it.
12 Lawton then left Gandia's apartment and spoke again with Suarez,
13 who told Lawton that Gandia had displayed a weapon.

14 After Sergeant Morales and Officer Lawton had both seen
15 the bullet and looked into Gandia's bedroom, Morales asked Gandia
16 whether he would consent to a search of the apartment. Gandia
17 refused. Gandia testified that he told Morales: "What are you
18 doing? You don't even have a search warrant. What are you
19 searching my apartment for?" Id. at 88. The parties dispute
20 whether Gandia then asked the officers to leave. All parties
21 agree that until then, Gandia had not asked the officers to
22 leave, but neither had he given them explicit permission to look
23 into the living room or bedroom.

24 According to Sergeant Morales, after Gandia refused to
25 permit a search of his apartment, Morales told the other officers
26 to leave and indicated that they should apply for a search

1 warrant.² One of the officers told Gandia that he was going to
2 be placed under arrest. The officers then took Gandia into the
3 building hallway, and, after he had closed the door of his
4 apartment, the officers placed Gandia under arrest, handcuffing
5 him. About five minutes elapsed between the time that the
6 officers entered Gandia's apartment and the time that they left
7 with Gandia. Based on the information the officers had obtained
8 during their presence in Gandia's apartment, they obtained a
9 warrant to search the premises. Upon executing the warrant, they
10 found a gun and additional ammunition in Gandia's apartment.
11 Gandia was charged with one count of being a felon in possession
12 of a firearm and ammunition, in violation of 18 U.S.C. §
13 922(g)(1).

14 Proceedings in the District Court

15 Gandia moved to suppress the physical evidence and his
16 statement that the bullet was a "fake," arguing that although the
17 gun and ammunition were discovered pursuant to a search warrant,
18 the warrant itself was based on information obtained from an
19 initial unconstitutional search. In a Memorandum and Order dated
20 June 18, 2004, the district court denied Gandia's motion to
21 suppress. The court upheld the search as a justified "protective
22 sweep" of the apartment. It therefore did not address the
23 government's alternative arguments that Gandia had given the

² As they were leaving, Morales also saw some gun magazines in Gandia's kitchen.

1 officers implied consent to enter the living room and that the
2 police would have inevitably discovered the evidence.

3 The district court first declared that it was
4 "undisputed that the officers were lawfully within Gandia's
5 apartment because they entered the premises on Gandia's consent."
6 United States v. Gandia, No. S1 03 Cr. 1503, 2004 WL 1396164, at
7 *3, 2004 U.S. Dist. LEXIS 11032, at *8 (S.D.N.Y. June 18, 2004).
8 The court therefore concluded that "the only issue is whether the
9 officers were entitled to conduct a protective sweep, even though
10 they did not intend to arrest Gandia at the time they entered his
11 apartment." Id. The court noted that under the Supreme Court's
12 decision in Maryland v. Buie, "officers entering a house with an
13 arrest warrant can conduct a protective sweep of the premises if
14 they possess 'a reasonable belief based on specific and
15 articulable facts that the area to be swept harbors an individual
16 posing a danger to those on the arrest scene.'" 2004 WL 1396164,
17 at *3, 2004 U.S. Dist. LEXIS 11032, at *8-9 (quoting Buie, 494
18 U.S. at 334). It rejected Gandia's argument that such protective
19 sweeps are only permissible when incident to an arrest. Drawing
20 on Buie's reasoning, and citing cases from other circuits, the
21 court instead found that "limited, pre-arrest protective sweeps
22 of a home for officer safety are lawful where there are specific
23 articulable facts supporting a reasonable suspicion of risk to
24 the officers' safety." 2004 WL 1396164, at *3, 2004 U.S. Dist.
25 LEXIS 11032, at *9.

1 The district court decided that the protective sweep of
2 Gandia's apartment was justified by specific and articulable
3 facts because: 1) the police officers knew that Gandia had
4 recently been involved in a heated altercation and was still
5 upset; 2) the radio report to which the officers responded
6 indicated that the dispute involved a firearm, and the officers
7 had been informed that Gandia had a gun; 3) the fact that Gandia
8 stated he did not have a gun before he was questioned about it,
9 and that no gun was found on his person when he was frisked
10 raised the possibility of a missing firearm; and 4) Suarez
11 reported that he had felt threatened enough to call the police
12 Therefore, the court concluded, "[t]he danger to the officers in
13 this situation [was] no less than if the officers had been there
14 pursuant to an arrest warrant." 2004 WL 1396164, at *4, 2004
15 U.S. Dist. LEXIS 11032, at *13.

16 Because the district court concluded that the
17 protective sweep was justified and that the officers found the
18 bullet and poster in "plain view" during the course of their
19 protective sweep, the court held that the search warrant
20 application was not based on a search that violated Gandia's
21 constitutional rights and that the gun, ammunition, and Gandia's
22 statement were therefore admissible.

23 After his motion to suppress was denied, Gandia was
24 convicted following a bench trial held on stipulated facts. At
25 sentencing, the district court rejected Gandia's motion for a
26 downward departure based on his HIV status and other medical

1 conditions and sentenced him to eighty-four months' imprisonment,
2 which was the mid-point of his sentencing range under the United
3 States Sentencing Guidelines.

4 DISCUSSION

5 I. Standard of Review

6 We review de novo the district court's legal
7 conclusions and accept its factual determinations, unless clearly
8 erroneous, viewing those facts in the light most favorable to the
9 government. United States v. Casado, 303 F.3d 440, 443 (2d Cir.
10 2002). In the specific context of a "protective sweep" by law
11 enforcement officers, we review de novo a district court's
12 determination as a matter of law that the officers had a
13 "reasonable suspicion" that a third person posing a danger to
14 them might be present on the property. United States v. Moran
15 Vargas, 376 F.3d 112, 114 (2d Cir. 2004).

16 II. "Protective Sweeps"

17 A Buie "protective sweep" is "a quick and limited
18 search of premises" that "is narrowly confined to a cursory
19 visual inspection of those places in which a person might be
20 hiding." Buie, 494 U.S. at 327. Unlike most warrantless
21 searches, which focus on the immediate danger posed by a suspect,
22 a Buie protective sweep allows officers to stop a potential
23 ambush by searching for unseen third parties. This distinction
24 separates Buie from the warrantless searches the Supreme Court
25 sanctioned in Chimel v. California, 395 U.S. 752 (1969), Terry v.

1 Ohio, 392 U.S. 1 (1968), and Michigan v. Long, 463 U.S. 1032
2 (1983).

3 Under Chimel, police may conduct "a search of the
4 arrestee's person and the area 'within his immediate control' --
5 construing that phrase to mean the area from within which he
6 might gain possession of a weapon or destructible evidence," id.
7 at 763, i.e., the "grab area." "[T]he justification for the
8 search incident to arrest considered in Chimel [was] the threat
9 posed by the arrestee" Buie, 494 U.S. at 336. We have
10 occasionally referred to the search of an arrestee's immediate
11 "grab area" under Chimel as a "protective sweep." See, e.g.,
12 United States v. Hernandez, 941 F.2d 133, 137 (2d Cir. 1991).
13 But as used by the Buie court, a "protective sweep" seems clearly
14 to refer to a search that focuses not on "the threat posed by the
15 arrestee, [but] the safety threat posed by the house, or more
16 properly by unseen third parties in the house." Buie, 494 U.S.
17 at 336.

18 This distinction similarly separates a Buie "protective
19 sweep" from the other types of searches that law enforcement
20 officials may conduct consistent with Fourth Amendment
21 protections despite the fact that they are made without a warrant
22 or probable cause. Terry and Long authorize warrantless searches
23 on less than probable cause in order for police "to assure
24 themselves that the persons with whom they [are] dealing [are]
25 not armed with, or able to gain immediate control of, a weapon."
26 Buie, 494 U.S. at 333. A Buie protective sweep addresses instead

1 the "interest of the officers in taking steps to assure
2 themselves that the house in which a suspect is being, or has
3 just been, arrested is not harboring other persons who are
4 dangerous and who could unexpectedly launch an attack." Id.

5 Buie authorizes a "protective sweep," defined as "a
6 quick and limited search of premises, incident to an arrest and
7 conducted to protect the safety of police officers or others," in
8 the context of a physical entry to execute an arrest warrant.

9 Id. at 327. A majority of our sister circuits that have
10 considered the issue have expanded Buie to authorize protective
11 sweeps even when officers have not entered a suspect's home
12 pursuant to an arrest warrant. See, e.g., United States v.
13 Martins, 413 F.3d 139, 149-51 (1st Cir. 2005); Leaf v. Shelnut,
14 400 F.3d 1070, 1086-88 (7th Cir. 2005); United States v. Gould,
15 364 F.3d 578, 581-87 (5th Cir.) (en banc), cert. denied, 125 S.
16 Ct. 437 (2004); United States v. Taylor, 248 F.3d 506, 513-14
17 (6th Cir.), cert. denied, 534 U.S. 981 (2001); United States v.
18 Patrick, 959 F.2d 991, 996-97 (D.C. Cir. 1992). These courts
19 have generally reasoned that because "[t]he underlying rationale
20 for the protective sweep doctrine is the principle that police
21 officers should be able to ensure their safety when they lawfully
22 enter a private dwelling," there is no reason to distinguish
23 between situations in which police enter pursuant to a warrant
24 and those in which police are present through other lawful means.
25 Leaf, 400 F.3d at 1087.

1 But there is something less than a consensus. See
2 United States v. Davis, 290 F.3d 1239, 1242 n.4 (10th Cir. 2002)
3 (rejecting argument that warrantless entrance justified a
4 protective sweep and emphasizing that a protective sweep "'is a
5 quick and limited search of premises, incident to an arrest and
6 conducted to protect the safety of police officers or others.'" (quoting Buie) (emphasis in Davis)); United States v. Reid, 226
7 F.3d 1020, 1027 (9th Cir. 2000) (holding that a protective sweep
8 was improper, in part because at the time of the search, the
9 defendant, "was not under arrest" (emphasis in original)).

11 Although we do not decide this issue, we do note that
12 when police have gained access to a suspect's home through his or
13 her consent, there is a concern that generously construing Buie
14 will enable and encourage officers to obtain that consent as a
15 pretext for conducting a warrantless search of the home. As the
16 Fifth Circuit, sitting en banc, recently recognized:

17 [P]rotective sweeps following a consent entry
18 may in certain circumstance pose Fourth
19 Amendment concerns not present in cases where
20 the initial entry is pursuant to a warrant.
21 For example, concerns might arise respecting
22 a consent to entry requested for a stated
23 common purpose but actually intended not for
24 that purpose but rather for the purpose of
25 gaining access in order to then make a
26 protective sweep of the entire home for
27 unrelated reasons and thus circumvent the
28 warrant requirement.

29 Gould, 364 F.3d at 589. This sort of pretext may be less likely
30 when police enter a home with a search warrant, see United States
31 v. Daoust, 916 F.2d 757, 759 (1st Cir. 1990), upon probable cause

1 combined with exigent circumstances, see Martins, 413 F.3d at
2 149-50, or pursuant to the "danger exception" to the normal
3 requirement that officers knock and announce themselves, see
4 Leaf, 400 F.3d at 1084-85. In the first circumstance, a warrant
5 would, in any event, have been obtained through judicial process;
6 and in the latter two circumstances, the presence of emergent
7 conditions in effect assures that the officers have a non-
8 pretextual reason for entering the premises.

9 In the instant case -- unlike when officers enter a
10 suspect's home in order to execute an arrest warrant or under
11 exigent circumstances -- there was no need for the police
12 officers to enter Gandia's home in the first place. They were
13 there for their own convenience (and perhaps for his) while
14 taking his statement. Indeed, the entrance or hallway of the
15 building, or their own police vehicle, would have fulfilled their
16 stated purposes: getting out of the rain, separating Gandia and
17 the building superintendent from each other, and obtaining a
18 measure of privacy. The officers could have avoided "the
19 disadvantage of being on his adversary's 'turf,'" Buie, 494 U.S.
20 at 333, by simply interviewing Gandia elsewhere. There was also
21 nothing preventing the officers from making explicit any concern
22 they may have had about the presence of others in Gandia's
23 apartment and seeking his express permission for a search of
24 other rooms. "A protective sweep is without question a
25 'search' . . . [and] they are permissible on less than probable
26 cause only because they are limited to that which is necessary to

1 protect the safety of officers and others." Buie, 494 U.S. at
2 335 n.3.

3 We confronted a similar problem in United States v.
4 Moran Vargas, 376 F.3d 112, 115 (2d Cir. 2004). There, the
5 police gained access to a suspect's hotel room through his
6 consent. They then searched his bathroom without his consent
7 using a "protective sweep" rationale. We declined to decide
8 whether Buie extends to warrantless searches³ because we
9 concluded that the particular search in Moran Vargas was not
10 supported by articulable facts that would cause a reasonable
11 officer to believe the area might harbor other people who might
12 pose a danger to the officers. Moran Vargas, 376 F.3d at 116.
13 We again find it unnecessary to decide whether Buie authorized a
14 protective sweep of Gandia's apartment despite the fact that the
15 police officers lacked an arrest warrant. The search of the
16 apartment was unconstitutional, even under such an extension of
17 Buie, because the police lacked specific, articulable facts to
18 justify their warrantless search.

19 The Buie Court explicitly declined to hold that the
20 danger inherent in executing an arrest warrant will ipso facto
21 justify a protective sweep: "The type of search we authorize
22 today . . . is decidedly not 'automatic,' but may be conducted

³ As in this case, we did not have occasion in Moran Vargas to address situations in which there is probable cause combined with exigent circumstances or an assertion of a "danger exception" to knock-and-announce rules. The government conceded that it lacked a search warrant and that there were no exigent circumstances present. See Moran Vargas, 376 F.3d at 114.

1 only when justified by a reasonable, articulable suspicion that
2 the house is harboring a person posing a danger to those on the
3 arrest scene." Buie, 494 U.S. at 336 (quoting Chimel, 395 U.S.
4 at 767 n.12 (alteration omitted)). Officers must point to facts
5 which give rise to an individualized suspicion and cannot rely
6 solely on generalizations that suspects are usually accompanied
7 by dangerous third parties. See Moran Vargas, 376 U.S. at 116.

8 As we have noted, in finding "articulable facts" to
9 justify the protective sweep of Gandia's apartment, the district
10 court pointed to: 1) the officers' knowledge that Gandia had
11 recently emerged from a heated argument; 2) the police radio call
12 which informed them that Gandia might have a gun; 3) the fact
13 that Gandia stated he did not have a gun prior to being
14 questioned about it; and 4) the fact that the officers had not
15 recovered the gun during their pat-down frisk of him. Even if
16 these facts support a reasonable inference that Gandia was hiding
17 a gun in the apartment, we do not see how they support the
18 inference that there was a person hiding in the apartment who
19 might use it. Any concern that Gandia himself might be dangerous
20 was fully and permissibly addressed by the officers by frisking
21 Gandia, and by a search within his "grab area," i.e., by looking
22 behind the sink next to which Gandia was standing to assure that
23 there were no firearms within Gandia's reach. The search of an
24 adjoining room to which Gandia had no ready access was
25 unnecessary for this purpose. Compare United States v.
26 Hernandez, 941 F.2d 133, 137 (2d Cir. 1991) (upholding protective

1 search of the suspect's "grab area") with United States v. Blue,
2 78 F.3d 56, 60 (2d Cir. 1996) (holding unconstitutional a search
3 that "extended beyond the area from within which [suspects] might
4 have gained possession of a weapon").

5 The government, moreover, has pointed to nothing in the
6 record from which a reasonable police officer could have inferred
7 that there was a specific danger of unknown third-parties hiding
8 in Gandia's apartment. Even if we agreed with the government's
9 argument that where "there is strong reason for the officers to
10 fear that there is an unaccounted-for gun on the scene, the
11 circumstances suggesting that another person may be present on
12 the scene need only be modest," Appellee's Br. at 26, the
13 government in this case has not made even a "modest" showing. Of
14 course, the police officers were not required to take Gandia at
15 his word when he told them that he lived alone, nor to infer that
16 there was no one else in the apartment when they entered. But
17 they also had no evidence to the contrary that would indicate a
18 third person might be hiding there. "'Lack of information cannot
19 provide an articulable basis upon which to justify a protective
20 sweep.'" Moran Vargas, 376 F.3d at 117 (quoting United States v.
21 Colbert, 76 F.3d 773, 778 (6th Cir. 1996)). Compare Taylor, 248
22 F.3d at 514 ("Before they were admitted into the apartment,
23 [officers] heard scuffling noises from inside that indicated that
24 there might be more than one person in the apartment."), with
25 Moran Vargas, 376 F.3d at 116 ("[N]one of the agents testified to
26 hearing any noises coming from the bathroom or to seeing any

1 evidence that might have indicated that another person was
2 present.").

3 III. Consent

4 The government argues, in the alternative, that we
5 should affirm the judgment of the district court by concluding
6 that Gandia consented to the officers' entering his living room.
7 We "can affirm the district court's order upon any ground that
8 the record demonstrates without limitation to the grounds on
9 which the district court relied." United States v. Dhinsa, 171
10 F.3d 721, 727 (2d Cir. 1999).

11 "The standard for measuring the scope of a suspect's
12 consent under the Fourth Amendment is that of 'objective'
13 reasonableness -- what would the typical reasonable person have
14 understood by the exchange between the officer and the suspect?"
15 Florida v. Jimeno, 500 U.S. 248, 251 (1991). The scope of the
16 suspect's consent is a question of fact, and "[t]he government
17 has the burden of proving, by a preponderance of the evidence,
18 that a consent to search was voluntary." United States v.
19 Isiofia, 370 F.3d 226, 230-31 (2d Cir. 2004).

20 It is clear from the testimony of both the police
21 officers and Gandia that the officers never explicitly asked for
22 permission to search Gandia's apartment and that Gandia did not
23 explicitly grant such permission. The government argues,
24 however, that by not objecting to Morales moving into the living
25 room, Gandia impliedly consented for the police to go there.
26 Gandia, however, testified that he did not notice that Morales or

1 Lawton had gone into the living room until he heard Morales
2 yelling that he had found a bullet, at which point Gandia
3 promptly objected to the search.

4 The district court did not reach the issue of consent
5 to a search in ruling on Gandia's motion to suppress. And the
6 record in its present state is not sufficient to permit us to
7 consider and decide the issue in the first instance. We
8 therefore remand for the district court to, inter alia, make
9 additional factual findings and conclude whether Gandia consented
10 to the police officers' entering other rooms of his apartment.
11 Cf. Moran Vargas, 376 F.3d at 113-14 (finding lack of consent
12 when "Moran quickly shut the bathroom door, telling the agents
13 that they could not use his bathroom").

14 III. Crosby Remand

15 The district court sentenced Gandia before United
16 States v. Booker, 125 S. Ct. 738 (2005), was decided, under the
17 then-mandatory United States Sentencing Guidelines. If on remand
18 the district court again denies Gandia's motion to suppress, the
19 court should determine "whether to resentence, now fully informed
20 of the new sentencing regime." United States v. Crosby, 397 F.3d
21 103, 117 (2d Cir. 2005) (emphasis deleted).

22 CONCLUSION

23 For the foregoing reasons, the case is remanded to the
24 district court with instructions for it to decide the issue of
25 consent. If the court decides in Gandia's favor on that issue,
26 it shall vacate its order and judgment of conviction and offer

1 Gandia a new trial (should the government seek to pursue one)
2 with the evidence suppressed. If the court decides the issue in
3 the government's favor and reconfirms the validity of the
4 conviction, it shall decide whether to re-sentence Gandia under
5 Crosby.